2005

State of Utah v. Brandon Williams : Brief of Appellant

Utah Court of Appeals

Richard Gale; Counsel for Appellee.
Karen A. Klucznik; Assistant Attorney General; Mark L. Shurtleff Attorney General; Timothy L. Taylor; Counsel for Appellant .

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.		Case No. 20050098-CA
	:	
BRANDON WILLIAMS,	:	
Defendant/Appellee.		

BRIEF OF APPELLANT

APPEAL FROM ORDER DISMISSING POSSESSION OF A CONTROLLED SUBSTANCE IN A DRUG-FREE ZONE (WITH PRIORS) CHARGE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a), (2)(c), (4)(c) (West 2004), AND BINDING DEFENDANT OVER INSTEAD ON POSSESSION OF DRUG PARAPHERNALIA IN A DRUG-FREE ZONE CHARGE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5(1) (West 2004), IN THE FOURTH JUDICIAL DISTRICT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF THE PROCEEDINGS

The State appeals from an order dismissing a charge of possession of a controlled substance in a drug-free zone (with priors), a first degree felony. This Court has pour-over jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUE ON APPEAL

Did the magistrate err in applying *Shondel* when he concluded that methamphetamine found in the residue of a plastic baggie could only support a possession of drug paraphernalia charge, not a possession of a controlled substance charge, where the statutes defining those crimes do not criminalize "exactly the same conduct"?

Standard of Review. "[R]eview under the *Shondel* rule focuses on the trial court's legal conclusions, which [this Court] review[s] under a correction-of-error standard, according no particular deference to the trial court's ruling." *State v. Kent*, 945 P.2d 145, 146 (Utah App. 1997) (citations and internal quotations omitted).

Preservation. This issue was preserved by the State's objection to the magistrate's dismissal of the felony charge of possession of a controlled substance in a drug-free zone. (R. 80-85; Findings of Fact, Conclusions of Law, & Order attached at Addendum A).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provisions are attached at Addendum B:

Utah Code Ann. § 58-37-8 (West 2004);
Utah Code Ann. § 58-37a-4 (West 2004);
Utah Code Ann. § 58-37a-5 (West 2004).

STATEMENT OF THE CASE AND FACTS

Defendant was charged by amended information with one count of possession of a controlled substance in a drug-free zone with prior convictions, a first degree felony, and absconding, a third degree felony (R. 59-60).

At defendant's preliminary hearing, Utah County Deputy Sheriff Daniel Forester testified that he arrested defendant on July 29, 2004, after defendant failed to return to jail as ordered (R. 129:5-6). Incident to arrest, Deputy Forester searched defendant and found, in defendant's front pocket, a plastic baggie containing a substance that appeared to be methamphetamine (R. 129:7). The substance field-tested positive for methamphetamine (*Id.*). The state crime lab confirmed that result (*Id.*).

On cross-examination, Deputy Forester confirmed that the crime lab did not weigh the methamphetamine, but rather, only concluded that "[m]ethamphetamine was identified in the residue in the plastic bag" (R. 129:15-16). Deputy Forester

acknowledged that the crime lab usually weighs the substance if there is a sufficient amount to weigh (R. 129:15).

Deputy Forester testified that defendant was within 1,000 feet of a public park and a church when he was arrested (R. 129:8). In addition, the State presented two final judgments recording defendant's prior convictions on drug-related charges (R. 129:16).

After the evidence was presented, defendant moved to dismiss the first degree felony possession of methamphetamine charge under *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146 (Utah 1969), and to bind defendant over instead on a misdemeanor possession of paraphernalia charge (R. 129:16-18; R. 83). Defendant argued that such a result was proper because one of the statutory factors the trier-of-fact "should consider in determining whether an item is paraphernalia . . . is the existence of residue on the item" (R. 129:17 (citing Utah Code Ann. § 58-37a-4(5)); R. 83).[1]

The magistrate ruled that where "the existence of residue on an item was one of the factors that the legislature anticipated would be considered by the trier of fact in determining whether an item was in fact paraphernalia[,] . . . the existence of residue on the baggie could establish both the crime as a felony and a misdemeanor" (R. 74, 82).

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[1] Utah Code Ann. § 58-37a-4 (West 2004) sets forth various factors which, "in addition to all other logically relevant factors," the trier of fact should consider "[i]n determining whether an object is drug paraphernalia." Such statutory factors include "[s]tatements by an owner or by anyone in control of the object concerning its use," "[p]rior convictions, if any, of an owner, or of anyone in control of the object . . . under [laws] relating to a controlled substance," "[t]he proximity of the object, in time and space, to a direct violation of this chapter," "[t]he proximity of the object to a controlled substance," "[t]he existence of any residue of a controlled substance on the object," and eight other factors. *See id.*

Thus, according to the magistrate, "under *State v. Shondel*, 453 P.2d 146 (Utah 1969), and its progeny, the court was obligated to bind the defendant over on the misdemeanor" (R. 74, 82).

The State filed a Motion to Reconsider Preliminary Hearing Bindover (R. 82). Defendant replied with a Motion to Strike Plaintiff's Motion to Reconsider (*Id.*). The magistrate denied the State's motion on the ground that both charges were supported by the methamphetamine residue:

> Since the existence of residue is the only evidence that can support a charge of *either* possession of drug paraphernalia or possession of a controlled substance, then the exact conduct is being prohibited. Therefore, the *Shondel* Doctrine does apply in this case and the Defendant must be charged with the offense carrying the lesser penalty.

(R. 81 (emphasis in original); R. 74). Defendant was thus bound over on one count of possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, and one count of absconding, a third degree felony (R. 81).

The State petitioned for interlocutory appeal (R. 86-112). The supreme court transferred the State's petition to this Court for disposition (R. 114). This Court granted the State's petition. *See* Order dated March 9, 2005.

SUMMARY OF THE ARGUMENT

Under *State v. Shondel* and its progeny, if two statutes define exactly the same penal offense, a defendant may be sentenced only under the statute providing the lesser penalty. The doctrine applies only when two statutes are wholly duplicative as to the elements of their crimes. If either statute requires proof of an element not required by the other, the *Shondel* doctrine does not apply.

The elements of possession of a controlled substance, a felony, are not exactly the same as the elements of possession of drug paraphernalia, a misdemeanor. Therefore, the magistrate erred in concluding that *Shondel* required dismissal of the greater crime in favor of the lesser.

ARGUMENT

THE MAGISTRATE ERRED IN APPLYING *SHONDEL* WHEN HE CONCLUDED THAT METHAMPHETAMINE FOUND IN THE RESIDUE OF A PLASTIC BAGGIE COULD ONLY SUPPORT A POSSESSION OF DRUG PARAPHERNALIA CHARGE, NOT A POSSESSION OF A CONTROLLED SUBSTANCE CHARGE, WHERE THE STATUTES DEFINING THOSE CRIMES DO NOT CRIMINALIZE "EXACTLY THE SAME CONDUCT"

Because the elements of possession of a controlled substance, a felony, are not exactly the same as the elements of possession of drug paraphernalia, a misdemeanor, the magistrate erred in concluding that it was obligated under *Shondel* to dismiss the greater crime in favor of the lesser. Therefore, this Court should reverse the magistrate's ruling and order that defendant be bound over on the possession of a controlled substance charge.[2]

"'In *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146 (Utah 1969), and its progeny, [Utah's courts] have held that where two statutes define exactly the same penal offense, a

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[2] The possession of a controlled substance count originally charged in this case was enhanced to a first degree felony because the crime was committed in a drug-free zone and defendant had prior convictions (R. 59-60). The possession of drug paraphernalia charge, on which defendant was actually bound over, was also enhanced because the crime was committed in a drug-free zone (R. 81). However, because the enhancements for neither crime impact analysis of the crimes under the *Shondel* doctrine, the State applies the doctrine to the crimes absent enhancements.

defendant can be sentenced only under the statute requiring the lesser penalty." *State v. Bluff,* 2002 UT 66, ¶ 33, 52 P.3d 1210 (citing *Shondel*, 453 P.2d at 147-48), *cert. denied*, 537 U.S.1172 (2003); *see also State v. Green* 2000 UT App 33, ¶ 6, 995 P.2d 1250.

Our courts have repeatedly stated that the *Shondel* doctrine "necessarily applies only when the two statutes address 'exactly the same conduct.'" *Bluff*, 2002 UT 66, ¶ 33 (quoting *State v. Gomez*, 722 P.2d 747, 749 (Utah 1986)); *see also State v. Kent,* 945 P.2d 145, 147 (Utah App. 1997). In other words, the doctrine applies only when the two statutes are "wholly duplicative as to the elements of the crime." *State v. Bryan*, 709 P.2d 257, 263 (Utah 1985). "[I]f one or both of the crimes at issue 'require[] proof of some fact or element not required to establish the other,' the statutes do not criminalize identical conduct and the State can charge an individual with the crime carrying the higher classification or more severe sentence." *State v. Federowicz*, 2002 UT 67, ¶ 47, 52 P.3d 1194 (citation omitted), *cert. denied*, 537 U.S. 1123 (2003); *Kent*, 945 P.2d at 147.

In this case, defendant was charged with one count of possession of a controlled substance based on methamphetamine found in the residue of a plastic baggie seized from defendant's pants pocket (R. 59-60; R. 129:7). The magistrate ruled that, since the methamphetamine evidence could also support a charge of possession of drug paraphernalia, a lesser crime, it was obligated under *Shondel* to bind defendant over only on the lesser possession of drug paraphernalia crime (R. 74, 81-82). Because the statutes defining possession of a controlled substance and possession of drug paraphernalia are not "wholly duplicative as to the elements of the crime," *Bryan,* 709 P.2d at 263, the magistrate's ruling was erroneous.

Possession of a controlled substance is defined under Utah Code Ann. § 58-37-8(2)(a)(i) (West 2004). That section provides that "[i]t is unlawful . . . for any person knowingly and intentionally to possess or use . . . a controlled substance." Utah Code Ann. § 58-37-8(2)(a)(i).

Thus, the elements of that crime are:

(1) knowingly and intentionally
(2) possessing or using
(3) a controlled substance.

See id. The statute does not define a minimum amount of controlled substance necessary to constitute a crime. *See id.* In fact, this Court has held that, if one possesses a controlled substance in any amount, even an unuseable residual amount, one is guilty under this statute. *See State v. Vigh*, 871 P.2d 1030, 1034-35 (Utah App. 1994) (affirming conviction for possession of cocaine based on residue which was not "measurable or quantifiable and was insufficient to produce a physical effect if consumed"); *State v. Warner*, 788 P.2d 1041, 1043-44 (Utah App. 1990) (affirming conviction for possession of methamphetamine based on residue found on vial).

Possession of drug paraphernalia is defined under Utah Code Ann. § 58-37a-5(1) (West 2004). That section provides:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter.

Thus, the elements of that crime are:

(1) knowingly, intentionally, or recklessly
(2) using or possessing with intent to use
(3) drug paraphernalia[3]
(4) to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter.

See Utah Code Ann. §§ 58-37a-5(1) (defining possession of paraphernalia); 76-2-102 (West 2004) (defining culpable mental state required when statute defining offense does not contain one).

A comparison of the elements of these crimes reveals that the statutes do not criminalize the same conduct. Specifically, the crime of possession of a controlled substance does not require proof of drug paraphernalia, and the crime of possession of drug paraphernalia does not require proof of a controlled substance. *Compare* Utah Code Ann. § 58-37-8(2)(a)(i) *with* Utah Code Ann. § 58-37a-5(1). Thus, possession of drug paraphernalia is not even a lesser-included offense of possession of a controlled

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[3] "Drug paraphernalia" is defined as

> any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale or to otherwise introduce a controlled substance into the human body in violation of Title 58, Chapter 37, and includes, but is not limited to...containers used, or intended for use to package small quantities of a controlled substance [or] to store or conceal a controlled substance.

Utah Code Ann. § 58-37a-3 (9), (10) (1999).

substance, let alone the same offense. *See State v. Hill,* 674 P.2d 96, 97 (Utah 1983) (setting forth test to determine when one offense is lesser-included of another).

In determining that "the exact [same] conduct is being prohibited" under both statutes (R. 81), the magistrate ignored the elements of the crimes as contained in their defining statutes. The magistrate focused, instead, on the plastic baggie and "whether," under the statute identifying factors to consider in determining if an item is paraphernalia, "the baggie would have been considered a drug paraphernalia without the presence of residue" (R. 75). The magistrate wrote: "Since the existence of residue is the only evidence that can support a charge of *either* possession of drug paraphernalia or possession of a controlled substance, then the exact conduct is being prohibited," and thus "the *Shondel* Doctrine does apply in this case" (R. 74, 81) (emphasis in original).

This Court rejected that very same analysis in *State v. Sorensen,* 2003 UT App 292 (unpublished, attached at Addendum C). In that case, Sorensen was charged with both possession of a controlled substance and possession of drug paraphernalia. *See id.* at ¶ 4 (unnumbered). When the magistrate dismissed both charges after the preliminary hearing, the State appealed, asserting that both charges should have survived bindover. *See id.* at ¶ 1 (unnumbered). In response, Sorensen claimed that, even if the magistrate erred in dismissing all the drug-related charges, Sorensen still could not be charged with both possession of a controlled substance and possession of drug paraphernalia because both charges were based on methamphetamine residue found on the paraphernalia. *See id.* at ¶ 4 (unnumbered). This Court rejected Sorensen's claim:

> However, the items could be considered paraphernalia even without the residue because presence of residue is a factor, rather than a requirement, used in determining whether an item is paraphernalia. *See* Utah Code Ann. § 58-37(a)-4(5) (2002). Therefore, the residue can form the basis for the methamphetamine charge, independent of the paraphernalia charge.

Id. at ¶ 4 (unnumbered); *see also Kent*, 945 P.2d at 147 ("While the statutes criminalizing forgery, insurance fraud, and communications fraud provide that these crimes may be accomplished through the use of a computer, the use of a computer is not an essential element of these crimes," and therefore, the statutes "are not wholly duplicative, [and] the *Shondel* rule does not apply.").

As in *Sorensen*, the fact that the residue in the plastic baggie could support charges for both the greater crime of possession of a controlled substance and the lesser crime of possession of drug paraphernalia does not mean that defendant may only be charged with the lesser crime under *Shondel*. Rather, because the elements of those two crimes are not exactly the same, *Shondel* does not even apply. *See Bluff*, 2002 UT 66, ¶ 33; *Fedorowicz*, 2002 UT 67, ¶ 47; *Green*, 2000 UT App 33, ¶ 6; *Kent*, 945 P.2d at 147; *Bryan*, 709 P.2d at 263.

Because the elements of possession of a controlled substance are not "wholly duplicative," *Bryan,* 709 P.2d at 263, of the elements of possession of drug paraphernalia, the magistrate erred under *Shondel* in dismissing the first degree felony possession of a controlled substance charge and replacing it with a misdemeanor possession of drug paraphernalia charge.

CONCLUSION

Based on the foregoing, the State asks this Court to reverse the magistrate's order and order that defendant be bound over for the possession of a controlled substance in a drug-free zone with priors, a first degree felony, and absconding, a third degree felony.

RESPECTFULLY SUBMITTED 5 July 2005.

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Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2005, I mailed first-class postage prepaid two copies of the foregoing Brief of Appellant to appellee's counsel of record, as follows:

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Addenda

Addendum A

Fourth Judicial District Court
of Utah County, State of Utah

1-31-05 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. **BRANDON WILLIAMS,** Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER** Case No. 041403028 Judge Steven L. Hansen

This matter came before the Court on September 28, 2004, for a preliminary hearing. At the conclusion of the preliminary hearing, the Court bound the defendant over to stand trial on Count 1 Possession of Paraphernalia in a Drug Free Zone, a class A misdemeanor and Count 2 Absconding, a third degree felony. On September 30, 2004, the plaintiff filed a Motion to Reconsider the Bindover. The Court, having reviewed the Plaintiff's Motion to Reconsider the Bindover does hereby make and enter the following Finding of Facts, Conclusions of Law and Order.

FINDINGS OF FACTS

1. On September 28, 2004, a preliminary hearing was conducted wherein the defendant Brandon Williams ("Williams") was present and represented by Richard Gale. The plaintiff was represented by Deputy Utah County Attorney, Timothy L. Taylor.

2. At the preliminary hearing the plaintiff called Deputy Daniel Forster from the Utah County Sheriff's Office to testify. Deputy Forster testified that on or about July 27, 2004, he received a call from an anonymous person saying Williams was possibly engaged in dealing drugs and that Williams was not going to return to the jail at the conclusion of his temporary release. Deputy Forster contacted the Utah County Jail and was informed that Brandon Williams had received a temporary release from custody by a judge from the Fourth District Court and was required to return on July 29, 2004, by 5:00 p.m.

3. At approximately 10:00 p.m. on July 29, 2004, Deputy Forster checked with the Utah County Jail and determined that Williams had not returned to the jail. In addition to William's failure to return to jail, Deputy Forster discovered an outstanding felony warrant for Williams issued out of the 5th District Court of Utah.

4. Deputy Forster obtained a photo of Williams from the Utah County Jail's booking system and responded to 939 E. 300 S. in Provo with Deputy Cory Wride in attempt to make contact with Williams. Deputy Forster knocked on the door at the residence and Williams answered. Deputy Forster was able to immediately take Williams into custody.

5. In searching Williams incident to his arrest, Deputy Forster located a small baggie containing a crystal substance in Williams' right pants pocket. Williams stated that he didn't know what was in the baggie and denied the baggie belonged to him.

6. Deputy Forster testified he submitted the baggie to the Utah State Crime Laboratory for testing. The test results from the crime lab were identified by Deputy Forster, marked as Exhibit #2 and received into evidence without objection. The crime lab report indicated "Methamphetamine was identified in the residue in the plastic bag."

7. Deputy Forster testified that the state crime lab will weigh a substance if the amount is sufficient to weigh, and that the scales at the crime laboratory can weigh substances in amounts as small as milligrams. Deputy Forster also admitted that the crime lab only refers to a substance as residue if the amount is insufficient to weigh with their scales.

8. In addition to providing the court with the test results from the crime lab, Deputy Forster retrieved the baggie he received back from the crime lab, and the court was able to view the baggie.

9. Deputy Forster testified that Williams was arrested within 1,000 feet of a public park and an LDS church increasing the penalty for possessing controlled substances in a drug free zone.

10. The plaintiff provided the court with documents indicating Williams had two prior convictions for controlled substances. The plaintiff marked the convictions as Exhibits #3 and #4 and the exhibits were received without objection.

11. The defendant had the opportunity to cross-examine Deputy Forster.

12. Counsel for the defendant cited Utah Code Annotated Section 58-37a-4(5) and argued that the legislature anticipated the existence of drug residue on an item of drug paraphernalia because section 58-37a-4(5) cites "the existence of any residue of a controlled substance on the object" as one of the factors that the trier of fact is to consider when determining whether an item is drug paraphernalia.

13. Counsel for the defendant further argued that a baggie alone is an innocuous item which has many legitimate purposes, therefore the baggie could not be considered drug paraphernalia without the presence of the controlled substance residue.

14. Counsel for the defendant further argued that because the baggie could not be considered drug paraphernalia without the existence of the residue, and since the same conduct could be punished as either possession of drug paraphernalia or possession of a controlled substance, Count 1 of the Information should be bound over as possession of drug paraphernalia. The plaintiff asked the court to bind the defendant over as charged in the Information.

15. The court determined that based on the evidence presented at the preliminary hearing, the baggie only contained residue. The court further determined that the existence of residue on an item was one of the factors that the legislature anticipated would be considered by the trier of fact in determining whether an item was in fact paraphernalia. The court concluded because the existence of residue on the baggie could establish both the crime as a felony and a misdemeanor, under State v. Shondel, 453 P.2d 146 (Utah 1969), and its progeny, the court was obligated to bind the defendant over on the misdemeanor.

16. The court did not bind the defendant over for trial on Count 1 Possession of a Controlled Substance in a Drug Free Zone with Prior Convictions, a first degree felony, but bound the defendant over to stand trial on Possession of Drug Paraphernalia in a Drug Free Zone, a class A misdemeanor. The court also bound the defendant over to stand trial on Count 2 Absconding, a third degree felony.

17. On September 30, 2004, the plaintiff filed a Motion to Reconsider Preliminary Hearing Bindover.

18. On October 1, 2004, the defendant filed a Motion to Strike Plaintiff's Motion to Reconsider.

CONCLUSIONS OF LAW

On November 17, 2004, the court issued a Memorandum Decision denying the Plaintiff's Motion to Reconsider the Preliminary Hearing Bindover. The Court considered whether the baggie would have been considered a drug paraphernalia without the presence of residue. The Court concluded that under Utah Code Annotated Section 58-37a-4(5) there are 13 factors which the trier of fact may consider in determining whether an item is drug paraphernalia, and the state only argued one factor, the existence of a controlled substance residue. Under these facts, as distinguished from the cases cited by the state, the court held that because the baggie could not be considered

paraphernalia without the existence of the residue then the 'Shondel Doctrine," as set forth in the case of *State v. Shondel*, 453 P.2d 146 (Utah 1969), applied to the present case.

The court reasoned that "a single object [may or] may not be sufficient for a determination of being a drug paraphernalia, but the close proximity of an item to additional paraphernalia and drugs increases the probability that the item in question is a drug paraphernalia, with or without the existence of residue. The court ruled, "Since the existence of residue is the only evidence that can support a charge of *either* possession of drug paraphernalia or possession of a controlled substance, then the exact conduct is being prohibited. Therefore, the Shondel Doctrine does apply in this case and the Defendant must be charged with the offense carrying the lesser penalty."

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law the court hereby Orders that Count 1 of the Information be bound over as Possession of Drug Paraphernalia in a Drug Free Zone, a class A misdemeanor, and Count 2 be bound over as Absconding, a third degree felony. Defendant is ordered to stand trial on the matters.

Signed this 31 day of January, 2005.

Judge Steven L. Hansen
Fourth District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER** to the following on the 1 day of ~~January~~ Feb, 2005:

Tim Taylor
Office of the Utah County Attorney

Richard Gale
Office of the Utah County Public Defender

Clerk

Addendum B

§ 58-37-8. Prohibited acts—Penalties

(1) Prohibited acts A—Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respec

(i) a substance classified in Schedule I or II, a controlled s analog, or gammahydroxybutyric acid as listed in Schedule III is g second degree felony and upon a second or subsequent conviction of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is a third degree felony, and upon a second or subsequent conviction of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A meanor and upon a second or subsequent conviction is guilty o degree felony.

(c) Any person who has been convicted of a violation of Su (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indetermin as provided by law, but if the trier of fact finds a firearm as de Section 76-10-501 was used, carried, or possessed on his person immediate possession during the commission or in furtherance of the the court shall additionally sentence the person convicted for a ter year to run consecutively and not concurrently; and the court may ally sentence the person convicted for an indeterminate term not t five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty degree felony punishable by imprisonment for an indeterminate ter less than seven years and which may be for life. Imposition or exe the sentence may not be suspended, and the person is not eli probation.

(2) Prohibited acts B—Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(3) Prohibited acts C—Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D—Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii);

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

§ 58–37a–4. Considerations in determining whether object is drug paraphernalia

In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this chapter;

(4) The proximity of the object to a controlled substance;

(5) The existence of any residue of a controlled substance on the object;

(6) Instructions whether oral or written, provided with the object concerning its use;

(7) Descriptive materials accompanying the object which explain or depict its use;

(8) National and local advertising concerning its use;

(9) The manner in which the object is displayed for sale;

(10) Whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(11) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) The existence and scope of legitimate uses of the object in the community; and

(13) Expert testimony concerning its use.

§ 58–37a–5. Unlawful acts

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act.[1] Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Addendum C

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellant,
v.
Gary SORENSEN, Defendant and Appellee
No. 20020964-CA.

Aug 28, 2003.

Sixth District, Manti Department; The Honorable David Mower.

Mark L. Shurtleff and Christine Soltis, Salt Lake City, for Appellant

Shelden R Carter, Provo, for Appellee.

Before Judges JACKSON, BENCH, and DAVIS.

MEMORANDUM DECISION (Not For Official Publication)

BENCH, Judge.

***1** At a preliminary hearing, bind-over is appropriate if the prosecution presents evidence establishing "probable cause to believe that the crime charged has been committed and that the defendant has committed it" Utah R Crim P 7(h)(2), *see also State v Clark,* 2001 UT 9,¶ 16, 20 P 3d 300 (eliminating the distinction between the probable cause required for an arrest warrant and the probable cause necessary to bind over). The evidence is viewed in the light most favorable to the prosecution, and all reasonable inferences are drawn in favor of the prosecution. *See id* at ¶ 10. The evidence produced at a preliminary hearing "need not be capable of supporting a finding of guilt beyond a reasonable doubt." *Id* at ¶ 15. Whether probable cause exists to bind over a defendant for trial is a question of law, reviewed on appeal "without deference to the court below." *State v Schroyer,* 2002 UT 26,¶ 8, 44 P 3d 730.

Although Defendant Sorensen was not in actual, physical possession of the paraphernalia and methamphetamine residue found in his house on August 8, the prosecution alleges that he constructively possessed both. The evidence presented at the preliminary hearing demonstrates probable cause to believe that Sorensen had "the ability and the intent to exercise dominion and control" over the paraphernalia and methamphetamine residue. *State v Hansen,* 732 P 2d 127, 132 (Utah 1987) For example, an officer testified that Sorensen's ex-wife stated that the bedroom where the contraband was found belonged to Sorensen and that "he had spent the [previous] night there." [FN1] Further, Sorensen's day planner, social security card, and other papers bearing his name were found in the bedroom. When viewed in the light most favorable to the prosecution, with all reasonable inferences being drawn in its favor, the evidence establishes the requisite "nexus" between Sorensen and the contraband to establish probable cause to have him bound over for trial *Id*

> FN1. In his appellate brief, Sorensen argues that his ex-wife's statements should not have been considered at the preliminary hearing because the statements are unreliable and only reliable hearsay is admissible at preliminary hearings. However, Sorensen failed to object to the admissibility of the statements, and issues not raised in the court below "cannot be argued for the first time on appeal" unless "exceptional circumstances" exist or "plain error" occurred. *State v Arguelles,* 2003 UT 1,¶ 41, 63 P.3d 731. Sorensen has argued neither "exceptional circumstances" nor "plain error." *Id.*

As for the charges resulting from the events of August 20, a positive urine analysis alone, without corroborating evidence, is sufficient to establish probable cause to believe that Sorensen possessed methamphetamine and morphine. [FN2] *Cf. State v. Sorenson,* 758 P.2d 466, 468 n. 2 (Utah Ct.App.1988) (recognizing decisions from other jurisdictions where the presence of alcohol or controlled substance in a person's urine did not establish possession beyond a reasonable doubt). Utah's statute defining possession of controlled substances clearly includes "inhalation, swallowing, injection, or consumption." Utah Code Ann. § 58-37-2(1)(dd) (2002).

> FN2. This, of course, does not preclude the possibility of establishing, at trial, that the presence of morphine was attributable to Sorensen's valid prescription for Lortab.

In response, Sorensen claims that he cannot be charged with both possession of methamphetamine and possession of paraphernalia because the methamphetamine charge stems from the presence of residue on the items the prosecution claims are paraphernalia. However, the items could be considered paraphernalia even without the residue because presence of residue is a factor, rather than a requirement, used in determining whether an item is paraphernalia. *See* Utah Code Ann. § 58-37a-4(5) (2002). Therefore, the residue can form the basis for the methamphetamine charge, independent of the paraphernalia charge. Finally, Sorensen's reliance on *Spanish Fork City v. Bryan,* 1999 UT App 61, 975 P.2d 501, is misplaced because *Bryan* addressed the standard of guilt beyond a reasonable doubt rather than probable cause.

***2** Accordingly, we reverse and remand the case for further proceedings.

I CONCUR: NORMAN H. JACKSON, Presiding Judge.

I CONCUR IN THE RESULT: JAMES Z. DAVIS, Judge.

2003 WL 22020494 (Utah App.), 2003 UT App 292

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